Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

CHARLES POINTER,

Petitioner,

v.

DART,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit sanctioned the United States District Court of Eastern Missouri to so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers when it failed to grant a new trial after finding that the United States District Court abused its discretion when the District Court, set a hearing, sua sponte and at said hearing quashed Plaintiff's Subpoenas of certain witnesses who were employees of the federal government?

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 2a-8a) is reported at 417 F.3d 819. The opinion of the district court (App., *infra*, 9a-12a) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 1, 2005. (App., *infra*, 2a-8a). The Petition for Rehearing En Banc was denied on September 8, 2005. (App, *infra,* 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF CASE

Petitioner was employed as an outpatient counselor at Respondent's drug abuse rehabilitation facility located at 4000 Laclede Ave., St. Louis, Missouri. As a trained counselor with a Master of Science degree specializing in counseling education from Southern Illinois University at Edwardsville, Petitioner counseled individuals on parole and serving probation. During late March or early April of 2000, Petitioner was notified by his supervisor, Mr. Milford Eaves, that he would replace Mr. Eaves temporarily as supervisor and mental health screener while Mr. Eaves took a leave of

absence. Aside from his supervisor, Petitioner was the only employee with a Master's degree at Respondent's outpatient facility and consequently was the only other employee qualified to perform mental health screenings. Several employees of the U.S. Probation and Pretrial Services Offices were also informed of Petitioner's interim supervisory position. However, Petitioner was never given the chance to serve in this interim capacity and was terminated from his counseling position with Respondent on May 18, 2000.

Mr. Eaves testified unequivocally in his deposition that U.S. Pretrial Services Officer Kevin Carbol and U.S. Probation Officer Dan McClintock individually, and separately pressured him to terminate Petitioner from his employment with Respondent. Mr. Carbol and Mr. McClintock supervised the individuals assigned to Respondent for treatment during pre- and post-incarceration periods and had frequent contact with Respondent's supervisors and counselors.

Mr. Eaves also testified that Mr. Carbol, Mr. McClintock and U.S. Probation Officer Thomas Caruso allowed an unqualified Caucasian individual to perform supervisory duties with Respondent while maintaining that Petitioner, despite his Master of Science degree specializing in counseling education, had documentation deficiencies and was therefore unqualified for a non-supervisory counseling position.

After learning of Mr. Eaves' testimony in deposition, Petitioner contacted Mr. Carbol, Mr. Caruso and Mr. McClintock by letters dated November 21, 2003. Petitioner requested informal interviews in accordance with U.S. Attorney protocol since the formal discovery deadline had passed. By letter dated December 1, 2003, Chief Pretrial

Services Office, Mr. Eugene C. Kain, Jr., stated that the Office of General Counsel for U.S. Pretrial Services would not consent to any informal interviews and instead would require a subpoena. Upon receipt of such correspondence, Petitioner served subpoenas on Messrs. Carbol, Caruso, and McClintock commanding each to attend and give testimony at the trial between Petitioner and Respondent.

Each subpoena was properly served pursuant to Rule 45 of the Federal Rules of Civil Procedure. Mr. Caruso was personally served by a process server at his place of business on January 2, 2004; Messrs. Carbol and McClintock were personally served at their places of business three days later on January 5, 2004. These witnesses were not expected to testify until several weeks later on January 26, 2004. Messrs. Carbol, Caruso, and McClintock were hardly inconvenienced since each works in the same courthouse in which they were called to testify. They were simply asked to remain on telephone standby and to take an elevator upstairs to testify when called upon by the district court. None of the subpoenaed individuals had been asked to disclose privileged information. Instead, each individual would have been asked to testify factually regarding his personal interaction with Respondent's supervisors and staff.

Pursuant to federal and local rules, subpoenas for trial testimony are not filed with the district court. Counsel for Petitioner received a telephone call from the district court's secretary informing him that the court, sua sponte, scheduled a hearing on Thursday, January 8, 2004 to discuss the enforceability of the subpoenas Petitioner had caused to be served on Messrs. Carbol, Caruso, and McClintock. Petitioner had not filed a Motion to Enforce the Subpoenas and no party or interested person had filed a Motion to Quash. Petitioner filed his Motion in Support of Enforcement of

Subpoenas after the district court scheduled the hearing to determine whether the subpoenas would be enforced.

The Eighth Circuit said in its Opinion, "It appears that the Assistant United States Attorney representing the Office had contacted the district court ex parte and urged it to rule on the matter."

No testimony was presented during the district court's January 8, 2004 hearing to determine whether the subpoenas would be enforced.

The district court denied enforcement of the subpoenas but allowed Petitioner to receive, for the first time, a copy of the contract between Respondent and the U.S. Probation and Parole Services Offices, entitled, "Treatment Services for Federal Defendants and Offenders." This contract was of little probative value because it neither addressed the relationships generally between the U.S. Probation and Parole Services Offices and Appellee, nor did it contain specific information about Mr. Eaves' contact with Messrs. Carbol, Caruso, and McClintock.

Evidence regarding Messrs. Carbol, Caruso, and McClintock was not presented at trial. Mr. Eaves testified regarding Petitioner's employment with Appellee and did not reference the subpoenaed individuals. Mr. Eaves was the only witness to testify to the specific reasons for Petitioner's termination. The testimony of Messrs. Carbol, Caruso, and McClintock may have contradicted Mr. Eaves' allegations. Pursuant to the district court's order, these witnesses did not testify. The jury did not find on behalf of Petitioner and instead rendered a judgment in favor of Respondent on January 28, 2004.

Petitioner subsequently filed an appeal with the Eighth Circuit on August 3, 2004 and was granted an oral argument, scheduled for February 18, 2005. This Court filed its Opinion in favor of Appellee on August 1, 2005. Petitioner's Petition for Rehearing and Rehearing En Banc was denied on September 8, 2005.

REASONS FOR GRANTING THE WRIT

Petitioner's right to trial under the seventh amendment of the United States Constitution was effectively denied by the District Court when it failed to enforce subpoenas which were essential if the Petitioner was to have the opportunity to prove his case.

It does not follow that the court of appeals found that the district court abused its discretion when it, sua sponte, quashed the subpoenas of four employees of the federal government but then the court of appeals said if these four witnesses would have testified it would not have affected the outcome of the case. We cannot know the effect these witnesses would have had on the jury because the witnesses were not allowed to testify. Further, the record demonstrates these witnesses were essential for the jury to determine whether Petitioner was fired as a result of racial discrimination.

Evidentiary rulings must be affirmed unless they affect a substantial right of a complaining party. *Foster v. Ford Motor Co.*, 621 F.2d 715 (Fifth Cir. 1980). This rule instructing that error may not be predicated on an evidentiary ruling unless a "substantial right of the party is affected" necessarily implies that, if there is a reasonable likelihood that a substantial right was affected, the effort should not be found harmless. *Johnson v. William C. Ellis & Sons Iron Works,*

Inc., 609 F.2d 820 (Fifth Cir. 1980). These facts required the Eighth Circuit to develop the "definite and firm conviction that a mistake had been committed" which would warrant not accepting the trial court's findings. *United States v. United States Gypsum Company*, 333 U.S. 364, 395 (1948).

Additionally, since the trial court based its findings upon a mistaken impression of applicable legal principles, the Eighth Circuit was not even bound by the clearly erroneous standard. *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194 (1963). As far back as *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879), this Court has said the appellate court may reverse a district court's decision when the ruling to receive or exclude evidence is manifestly erroneous. Certain general principles govern the appellate court's power to overturn findings of a district court. The foremost of these principles is that a finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. *Anderson vs. City of Bessemer City, N.C.*, 470 U.S. 564 (1985); *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993). While Rule 52(a) admonishes due regard for the trial court's opportunity to assess the credibility of witnesses, the trial judge's views as to credibility are not completely impervious. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

As the Eighth Circuit established in its Opinion, the district court abused its discretion when it *sua sponte* scheduled a hearing to determine whether it would enforce Petitioner's subpoenas and then subsequently denied enforcement of the subpoenas. However, the subpoenaed individuals' testimony was not only relevant but also essential to the fair adjudication of Petitioner's claims. Respondent's

own witness testified that the subpoenaed individuals pressured him to terminate Petitioner. The testimony of these very individuals could be no more relevant to Petitioner's claims. The district court's refusal to require these witnesses to testify constituted prejudicial error, an abuse of discretion and reversible error. The subpoenaed individuals' denial of Respondent's witness' allegations would have called into question this witness' credibility and affected the outcome of the trial. For this reason, this Writ should be granted because the U.S. Probation and Pretrial Services officers' trial testimony would have more likely than not produced a different result.

The district court's abuse of discretion was so prejudicial that the jury had no choice but to find against Petitioner. By refusing to enforce Petitioner's subpoenas, the district court prevented him from confirming or refuting testimony given by Respondent's own witness, Mr. Milford Eaves. This ruling in question was so consequential that a new trial allowing the evidence would likely produce a different result. *Bevan v. Honeywell*, Inc., 118 F.3d 603, 612 (8th Cir. 1997).

Mr. Eaves claimed in his deposition that Mr. Carbol and Mr. McClintock pressured him to terminate Petitioner. The only evidence concerning this issue is from Respondent's own employee, who claims that he felt pressure from the probation and parole officers to terminate Petitioner. Petitioner had no choice but to further investigate Mr. Eaves testimony until confirmed or refuted by concrete evidence or testimony. A denial of Mr. Eaves' allegations undoubtedly would have called into question Mr. Eaves' credibility and affected the outcome of the trial. Refusing to allow Petitioner to examine the information necessary to contradict Mr. Eaves is a clear abuse of discretion by the trial court. *Slathar v. Sather Trucking Corp.*, 78 F.3d 415, 419 (8th Cir.), cert. denied, 519